Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

MC ASSOCIATES, a Maine limited partnership,

Petitioner,

v.

TOWN OF CAPE ELIZABETH,

Respondent.

On Petition For Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the owner of a residential building lot (a lot of record since 1964) be barred from building a single family house on that lot, and from constitutionally challenging that bar, merely because the present form of his legal ownership of that lot arises after the passage of local land use ordinances that prevent development of the property?

2. Does a diminution in value of a single family house lot from $88,000 (if buildable) to $3,000 (if unbuildable) constitute a categorical taking, notwithstanding the fact that the residual value of the unbuildable lot is greater than zero?

3. In settings where a categorical taking is **not** found, may the court dispose of the case on a summary judgment motion (as happened here), or must it then proceed to determine whether a non-categorical taking has occurred under more conventional *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) takings doctrines and analyses?

4. In the face of an unequivocal denial by the Town of the right to build on a residential lot (a denial predicated on Wetlands and Minimum Lot Size provisions in the Town's Zoning Ordinance) must the owner of the building lot nonetheless pursue to finality (actually obtain) a State waste discharge permit in order to show compliance with the Town's Sewage Disposal Ordinance and to perfect his taking claim?

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PETITION FOR WRIT OF CERTIORARI

MC Associates, a Maine limited partnership, respectfully prays that a writ of certiorari issue to review the final judgment and opinion of the Maine Supreme Judicial Court entered on June 15, 2000, and that court's denial of a timely filed motion for reconsideration which would have allowed the court to reconsider its judgment and opinion in light of this Court's holding in *Palazzolo*. The actions of Maine's highest court are in conflict with this Court's takings jurisprudence as it stood prior to *Palazzolo v. Rhode Island, et al.*, 121 S. Ct. 2448 (2001) and is in clear conflict with this Court's holding in *Palazzolo*. A granting of the writ sought is the only way these conflicts may be resolved.

OPINIONS BELOW

The Maine Supreme Judicial Court's opinion was filed on June 15, 2001 and is reported as *MC Associates v. Town of Cape Elizabeth*, 773 A.2d 439 (Me. 2001); it is reprinted in the Appendix, App. 1-12. On July 26, 2001, the Maine Supreme Judicial Court denied (without opinion) a timely filed motion for reconsideration of its June 15th holding. This motion was filed to allow Maine's highest court to reconsider its June 15th decision in light of this Court's holding in *Palazzolo v. Rhode Island, et al.*, 121 S. Ct. 2448 (2001); the denial is reprinted in the Appendix, App. 20; the motion for reconsideration and supporting memorandum of law is reprinted in the Appendix, App. 21-33.

The trial court bifurcated the issues presented by MC Associates. In a Decision and Order dated July 16, 1998 the lower court sustained the Town's denial of a variance from the wetlands provisions of the Town's zoning ordinance, thus precluding any development (in particular the building of a proposed residence) on MC Associates' lot; this Decision and Order is reprinted in the Appendix, App. 17-19. The trial court in an Order dated August 27, 2000 then disposed of the remaining issues, including MC Associates' taking claim, and its asserted right to build on a lot of less than 20,000 square feet (a minimum lot size requirement adopted after the lot in question was of record) by meeting state standards for private subsurface waste disposal systems. All of these dispositions were adverse to MC Associates' interests; this Order is reprinted in the Appendix, App. 13-16.

The two lower court decisions and orders were consolidated in a timely filed appeal to Maine's Supreme Judicial Court which resulted in the June 15, 2001 holding and opinion previously noted.

JURISDICTION

The judgment of the Maine Supreme Judicial Court was entered on June 15, 2001. On its face this decision purported to dispose of all state and federal claims raised by MC Associates. A timely motion for reconsideration was filed by MC Associates on June 29, 2001. This motion was denied by the Maine Supreme Judicial Court (without opinion) on July 26, 2001. Pursuant to U.S. Supreme Court Rule 13.1, this petition for writ of certiorari has

been filed within 90 days of the denial of reconsideration. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The provision of the Fifth Amendment to the United States Constitution that is relevant here states: " . . . nor shall private property be taken for public use without just compensation." The Wetlands and Minimum Lot Size provisions of the Town of Cape Elizabeth's zoning Ordinance have been interpreted in a way that violates this constitutional proscription. By barring any, and all, development use of MC Associates' property, the Town has acquired nearly one-half acre of open space at no cost. These actions have been sustained by Maine's highest court, and precipitate this petition for writ of certiorari in an effort to remedy this violation of MC Associates' property rights.

STATEMENT OF THE CASE

The subject parcel in these proceedings consists of single residential building lot (approx. 18,500 sq. ft. in size). It has been a lot of record since 1964. MC Associates, with others, and in various legal forms, has held an interest in the lot since it became a lot of record. MC Associates, a Maine limited partnership, has held exclusive title to the property since January 1989. The lot is zoned for single family residential use; this is the only

permitted use of the subject parcel and of all developable land in the immediately surrounding area; the lot is taxed as a buildable lot by the Town of Cape Elizabeth. The minimum lot size provisions of the Town's zoning ordinance were put in place well after 1964 but some time before 1989; the wetlands provisions of the ordinance were put in place in 1990. MC Associates applied for a building permit to develop the lot in March, 1996. The application for a building permit was denied and after exhausting all of its administrative remedies, MC Associates commenced these legal proceedings.

The dates of enactment of the Wetlands and Minimum Lot Size provisions in the Town's zoning ordinance are important only if one accepts the Town's argument that MC Associates' exclusive title to the property and their application to develop the property (falling as they do after these dates) binds MC Associates to these provisions in the ordinance, renders the lot unbuildable as a matter of law, and bars a taking challenge. Over MC Associates' objection, all of these arguments were accepted by the trial court; its August 27, 2000 holding clearly evidences this fact, (see App. 14). In its affirmance of the lower court's holding (see App. 10-11), the same arguments were also accepted by Maine's highest court. **But**, these are the precise arguments that were rejected by this Court's holding in *Palazzolo v. Rhode Island, et al.*, 121 S. Ct. 2448 (2001), see particularly part II B. These inconsistencies between Maine's highest court and this Court's holding in *Palazzolo* were sought to be brought to the attention of Maine's highest court in a timely filed motion for reconsideration of its June 15, 2001 holding. That

motion (as previously noted) was denied, without opinion, by the Maine court's July 26th order, see App. 20. Whether Maine's highest court did not grasp the significance of *Palazzolo* as it related to the actions of MC Associates and the Town of Cape Elizabeth, or whether it simply chose to ignore *Palazzolo* cannot be determined; what is clear is that the failure to apply *Palazzolo* in the instant proceedings has deprived MC Associates of valuable property rights protected by the Fifth Amendment and seemingly protected by holdings of this Court.

In sum, the facts of this case seem clear; they are not contested. It is the holdings and actions of Maine's courts noted above (the legal reasoning and/or the lack thereof) that has precipitated the timely filing of this petition for writ of certiorari. MC Associates prays the writ will be granted. With respect to the important takings issues raised here, this Court is the only body that can remove the present inconsistency between the holdings of Maine's highest Court and the law of the land as articulated by this Court in *Palazzolo*.

REASONS FOR GRANTING THE WRIT

In laying out the "Questions Presented" in this petition, four reasons for granting the writ are stated. Each raises important Takings law issues, issues with respect to which there is sharp disagreement and inconsistency between the holdings of this Court and the holdings of Maine's highest court. This disagreement not only denied MC Associates of valuable property rights protected by

the Fifth Amendment, but puts all property owners in Maine at similar risk.

QUESTION 1

Can the owner of a residential building lot (a lot of record since 1964) be barred from building a single family house on that lot, and from constitutionally challenging that bar, merely because the present form of his legal ownership of that lot arises after the passage of local land use ordinances that prevent development of the property?

The Town of Cape Elizabeth, the trial court below (see App. 14), and Maine's highest court all answer this question, Yes. So too, did the highest court of Rhode Island. See 746 A.2d 707 (R.I. 2000). **But** this Court's holding in *Palazzolo v. Rhode Island, et al.*, 121 S. Ct. 2448 (2001), see particularly part II B, is firmly to the contrary. Relying on reasoning first presented in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987), *Palazzolo* makes clear that takings challenges that could have been brought by former owners of a property may be brought by present owners at whatever point in time they directly confront regulations that arguably go "too far" and thus constitute a "regulatory taking" as defined by *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

In short, the question is not – when, or in what legal form, did the present owner of a property acquire his interest? The real question is – do the regulations of the Town of Cape Elizabeth go "too far" – do they constitute a taking of MC Associates' property? That question was never answered by the trial court in these proceedings or

by Maine's highest court. It was cut off by these court's adherence to the now discarded theory that Rhode Island advanced in the *Palazzolo* case. As this Court noted in *Palazzolo*:

> Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

121 S. Ct. at 2462-63. Maine's highest court has, in effect, resurrected the discarded approach Rhode Island sought to advance. It has ignored *Palazzolo*. The granting of this petition for writ of certiorari is necessary to insure that the holding in *Palazzolo*, the rule of Takings law laid out above, will be applied, both in the instant case and throughout Maine generally.

QUESTION 2

Does a diminution in value of a single family house lot from $88,000 (if buildable) to $3,000 (if unbuildable) constitute a categorical taking, notwithstanding the fact that the residual value of the unbuildable lot is greater than zero?

The Town of Cape Elizabeth, the trial court below (see App. 15) and Maine's highest court (see App. 11) all answer this question, No. Their view is best summed up by the highest court's analysis of appraisal testimony in the record before it. They note: " . . . the property is worth

$88,000 as a 'buildable' lot and $3,000 as a 'non-buildable' lot. This evidence does not support a finding of a categorical taking." See App. 11. In other words, in Maine the law is that unless the residual value (the after-regulation value) of the property is zero, there cannot be a categorical taking. **But** the reasoning of *Palazzolo* strongly suggests a contrary view. Speaking specifically to the categorical takings issues raised in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) this Court stated that: " . . . a state may not evade the duty to compensate on the premise that the landowner is left with a token interest." 121 S. Ct. at 2464. The logic of *Palazzolo* seems clear: when the residual value (the after-regulation value) of a property, though not actually zero, is nonetheless so close to zero, and/or has so reduced the reasonable expectations of economic return from the property that what is left is tantamount to zero, a categorical taking within the framework of *Lucas* can be said to have occurred. That is precisely the case here – the acknowledged diminution in value is so great, so close to zero, that a categorical taking predicated on the reasoning of *Lucas* as modified by *Palazzolo* has, in fact, occurred.

The logic of this reasoning is not altered by the fact that in the *Palazzolo* case itself a residual value of at least $200,000 prompted this Court to remand the case to the state court to determine what the realistic buildable value of the parcel was, and whether a taking, not under the rationale of *Lucas* but under the rationale of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) had occurred.

In sum, the writ petitioned for is necessary for one, or both, of two reasons. First, to correct the discrepancy

between the reasoning and holding of this Court and that of Maine's highest court with respect to *Lucas* and the parameters of categorical takings. And second, to inform Maine's highest court that, in settings where a categorical taking is not found, their work is not done; the court must then determine whether a taking under the more liberal balancing of interests rationale of *Penn Central* has nonetheless occurred. Only in this way will the interests of MC Associates, indeed all property owners in Maine, be fully protected under the Fifth Amendment.

QUESTION 3

In settings where a categorical taking is not found, may the court dispose of the case on a summary judgment motion (as happened here), or must it then proceed to determine whether a non-categorical taking has occurred under more conventional *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) takings doctrines and analyses?

Without abandoning the position taken in response to Question 2, MC Associates recognizes that this Court could conclude that the residual value of the property here (though small in relation to its buildable value) is greater than a "token interest", and thus a categorical taking has not occurred. If this Court so concludes, the answer to Question 3 seems obvious – other theories that would sustain the taking allegation must then be examined. That is precisely what this Court said in *Palazzolo;* it was the purpose of this Court's remand order: "The claims under the *Penn Central* analysis were not examined, and for this purpose the case should be remanded." 112 S. Ct. at 2465. Moreover, such a course is essential if

the taking question raised by MC Associates is to be fully and finally resolved. In other words, a finding that there was not a categorical taking does not end examination of the taking question, it merely shifts the focus of the debate to other theories that might well sustain the proposition.

The trial court's analysis of the taking question begins and ends with its statement: "Further, the plaintiff's property continues to have value." See App. 15. That's it – in the trial court's view, if there is any remaining value, there is no taking. This view of Takings law under the Fifth Amendment is simply incorrect. It ignores Maine case law and almost the entire body of case law developed by this Court in recent years.

Maine's highest court begins its review of the taking questions posed on a more hopeful note. It reviews *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and recognizes the relevance of *Penn Central*, see App. 3-4. Drawing on prior Maine cases such as *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475 (Me. 1982) and *Wyer v. Bd. of Envtl. Prot.*, 747 A.2d 192 (Me. 2000) the court seems to recognize that a taking can occur if a regulation leaves a property "**substantially**" useless, or strips it of "all **practical** value." See App. 7-8. These cases clearly stand for the proposition that a diminution in value does not have to be total for a taking to be found. But instead of following this line of reasoning, the court cuts its analysis off by noting that: " . . . MC has not established . . . a categorical taking because it has not shown that the property has lost all value as a result of the imposition of the wetlands amendments." See App. 11.

The court concludes its taking discussion by saying, in effect, that if there is no categorical taking, there is no taking. This view is not the law. It is not supported by any Maine cases; it is certainly not supported by the Maine cases cited by the court. It is not supported by any case law of this Court prior to *Palazzolo*; and it is contrary to this Court's explicit holding in *Palazzolo*.

In short, even if a categorical taking in not found, it was inappropriate for the trial court and for Maine's highest court to dispose of MC Associates' taking claim on a motion for summary judgment – a motion that cut-off consideration of other theories that arguably sustain MC Associates' taking claim. The petitioned writ is necessary to correct these errors – here, as in *Palazzolo*, "The claims under the *Penn Central* analysis were not examined" – a remand is in order.

QUESTION 4

In the face of an unequivocal denial by the Town of the right to build on a residential lot (a denial predicated on Wetlands and Minimum Lot Size provisions in the Town's Zoning Ordinance) must the owner of the building lot nonetheless pursue to finality (actually obtain) a State waste discharge permit in order to show compliance with the Town's Sewage Disposal Ordinance and to perfect his taking claim?

Unless ripeness issues are to become little more than a trap, the answer to this question is, No. The reasoning of *Palazzolo* would suggest that the answer to this question is, No. This answer would also accord with this

Court's recent holdings in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738 (1997) and *Monterey v. Del Monte Dunes*, 526 U.S. 687, 698 (1999). In all of these cases, the unequivocal pronouncements of the governing body barring development were deemed to be sufficiently final to meet the ripeness requirements of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). In the instant proceeding, the Town of Cape Elizabeth's unequivocal pronouncements that it would not issue a building permit to MC Associates, that its interpretation of the Town's minimum lot size and wetlands provisions (individually, and taken together) barred issuance of a building permit seem similarly final. These pronouncements, as in *Palazzolo*, *Suitum*, and *Monterey* are sufficient to overcome any ripeness barriers.

Maine's highest court seemed to agree. It found the claim MC Associates put forward to be ripe on both state and federal grounds, see App. 5-7. But having said this, the court goes on to erect three threshold-type, ripeness-type barriers to sustain the lower court's grant of the Town's motion for summary judgment and bar itself from reaching the full merits of MC Associates' takings claim.

First, the court agrees with the Town that the lot in question was not buildable (on minimum lot size grounds) even prior to adoption of the Town's wetlands provisions. See App. 10-11. Second, the court holds that no evidence was presented concerning compliance with the Town's sewage disposal ordinance. See App. 10. And third, the court accepts the Town's argument that MC Associates' valuation evidence was insufficient. See App. 11.

Each of these findings are at odds with the record and with other portions of the court's findings and reasoning. As to whether the lot was ever buildable – clearly it was. All of the parties (and the court) agree, the lot in question was of record in 1964. See App. 8. This is long before any state or local government minimum lot size or wetlands regulations were put in place. Prior to these regulations the lot was surely buildable, and but for these more recent regulatory impositions (the reasonableness of which underlies MC Associates' entire suit), the lot would be buildable today. Any non-buildable assertion (by the Town or the court) that turns on the State's minimum lot size law, 12 MRSA §4807 et seq. is wholly untenable. That enactment was put in place in 1969; the lot was buildable (under state law prior to this date). More importantly, §4807-D of the statute creates a total **exemption** from the requirements of the state's minimum lot size law for lots of record created prior to January 1, 1970. MC Associates' lot qualifies for this **exemption**. It follows then that if the lot is unbuildable on minimum lot size grounds some provision of the local ordinance must make it so. The only applicable provision requires that lots of less than 20,000 square feet, if not served by public sewer, (as is the case here) must meet the requirements of the town's sewage disposal ordinance, §19-3-3. See App. 8-9. If these requirements are met, the lot is buildable. In short, the Town's minimum lot size provisions have never characterized lots of less than 20,000 sq. ft. as unbuildable – they only require that such lots provide proper sewage disposal.

That brings us to the second assertion of the court, i.e., that no evidence was presented concerning compliance with the Town's sewage disposal ordinance §19-3-3. This is simply incorrect. The record on this point (acknowledged by the court, see App. 10) is clear; it shows that a professional engineer on behalf of MC Associates prepared an application (directed at both the town and the State Department of Human Services) that certified that the proposed sewer system, " . . . is in accordance with the [State's] Subsurface Wastewater Disposal Rules."[1] The fact that the Town was unwilling to accept or deal with the application shows only that it was adamant in its refusal to allow building on this lot. The fact that MC Associates did not pursue its DHS application to finality shows only that it cut short what would have been a futile, meaningless, and costly step – a step that even if completed would not have allowed them to build – a step deemed unnecessary by *Palazzolo*. The *Palazzolo* court made clear that an otherwise ripe case does not become unripe because the applicant fails to apply for and obtain collateral permits that even if granted would not allow the project to go forward. It noted: " . . . federal ripeness rules do not require the submission of further and futile applications with other agencies." 121 S. Ct. at 2462. Finally, on this point it should be noted that the Town offered no evidence that impugns the credentials of the engineer, or that suggests that the engineer's findings were incorrect. On this record it seems incredible that

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[1] Compliance with the State's subsurface waste disposal requirements is deemed to meet the town's §19-3-3 requirements.

Maine's highest court could conclude that no evidence was presented showing compliance with §19-3-3. That clearly is not the case.

As to the third barrier raised by the court, i.e., that MC Associates' valuation evidence was not sufficient, that it did not establish a *prima facie* case for a taking – here, again, the assertion of the court is not borne out by the record. The only competent evidence in the record with respect to valuation was prepared for, and presented by, MC Associates. It is unrefuted. As a body of evidence, it speaks for itself and clearly meets any dictionary definition of prima facie evidence. The numbers with respect to valuation ($88,000) as a buildable lot and ($3,000) as an unbuildable lot were not challenged in any way by the Town. The Town presented no competing or alternative valuation evidence of its own – none. The Town did not challenge the credentials of the appraiser. Given this record and these evidentiary omissions on the part of the Town, it seem incredible for the court to assert the proposition that not even a *prima facie* case of taking was made.

More importantly, the Town of Cape Elizabeth, the lower court, and Maine's highest court all accepted MC Associates' valuation evidence (evidence showing that the residual value of the subject lot was $3,000) for the purpose of showing that a categorical taking did not occur. They cannot now impugn that very evidence when it is offered to meet ripeness requirements, and/or to show that a taking under *Penn Central* may have occurred. This Court in *Palazzolo* rejected Rhode Island's facile effort to employ a similar strategy. The state was

not allowed to rely on evidence with respect to the residual value of Mr. Palazzolo's parcel to show that *Lucas'* categorical taking requirements were not met, and then impugn that data in an effort to cast doubt as to the ripeness of the case. See 121 S. Ct. at 2460-61. The *Palazzolo* reasoning seems clear – a case meeting the threshold requirements for ripeness does not become unripe merely because valuation data is subject to question. And evidence used by government for one purpose cannot be impugned merely because it does not serve another purpose (argument) the government would make. This Court should take the same view here.

Summarizing the Question 4 issues raised: it seems clear that under *Palazzolo, Suitum,* and *Monterey,* ripeness requirements have been met here. That seemed to be the initial view of Maine's highest court, but then it interposed a series of ripeness-type barriers that prevented it from reaching the full merits of the case. Upon examination of the underlying law and facts borne out in the record, none of these barriers stand up. At least two are refuted by this Court's holding in *Palazzolo.* The facts are: the subject lot was, and remains (but for the town's regulatory impositions) buildable; there was credible evidence that the Town's sewage permit requirements could be met – the actual permit was not pursued to finality only because procuring it would have been futile – the permit would not have allowed MC Associates to actually build; and finally, the valuation evidence presented by MC Associates and made a part of the record was relied upon by the Town, the lower court, and Maine's highest court – it was unrefuted. The failure of Maine's highest court to accept these facts prevented it from reaching MC

Associates' claims arising under a *Penn Central* analysis. This was error that can only be corrected by this Court's issuance of the writ petitioned for.

CONCLUSION AND REMEDIAL RELIEF SOUGHT

For all of the reasons stated above, petitioner respectfully asks this Court to grant the writ sought. Without it, the discrepancies between Maine's highest court and this Court with respect to fundamental and important aspects of the law of Taking will remain in place. MC Associates and property owners throughout Maine will not be afforded the full measure of Fifth Amendment constitutional protections that this Court has fashioned through a growing body of case law, and most recently by its holding in *Palazzolo*.

Having said this it is tempting to ask this Court to grant the writ for the purpose of taking up the merits of the case. A buildable lot has been rendered all but valueless by regulatory impositions of the Town of Cape Elizabeth. Administrative remedies have been exhausted. The town is adamant – it will not issue a building permit for the only permitted use of the property – a single family house. Petitioners firmly believe that this constitutes a taking, if not under a *Lucas* analysis, then almost certainly under a *Penn Central* analysis.

But petitioners are also aware of the understandable reluctance of this Court to overturn a holding of the highest court of a State. This is particularly the case when the record presented to this Court is not as complete as it might be, not as complete as petitioners in a more perfect

world would wish it to be. Indeed, the record before Maine's highest court might not have been as complete as they (or petitioners) had wished it to be.

This being the case, petitioners would ask that a writ of certiorari be granted for a more limited purpose, i.e., for the purpose of vacating the judgment of the highest court of Maine in this case, and remanding the case to Maine's Supreme Judicial Court for further consideration in light of this Court's holding in *Palazzolo* and arguments raised in this petition. This is precisely the course taken by this Court in *McQueen v. South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management*, 121 S. Ct. 2581 (2001). This would be a modest and prudent use of this Court's powers – one that respects our federalism as well as the rights and interests of the parties.

Dated: October 19, 2001

Respectfully Submitted,

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Reporter of Decisions

MAINE SUPREME JUDICIAL COURT
Decision: 2001 ME 89
Docket: Cum-00-493
Argued: February 14, 2001
Decided: June 15, 2001

Panel: WATHEN, C.J., and CLIFFORD, RUDMAN, DANA, SAUFLEY, ALEXANDER, and CALKINS, JJ.

MC ASSOCIATES

v.

TOWN OF CAPE ELIZABETH et al.

WATHEN, C.J.

[¶1] MC Associates (MC) appeals from a summary judgment entered in the Superior Court (Cumberland County, *Mills, J.*) in favor of the Town of Cape Elizabeth[1] on MC's regulatory takings claims. MC argues that the court erred by determining that its federal takings claims are not ripe and that its property has not been deprived of all practical value. Although the federal claim was ripe, we affirm the judgment because MC generated no

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[1] The defendants in this case include Town of Cape Elizabeth, the Town Council of Cape Elizabeth, the Cape Elizabeth Planning Board, the Cape Elizabeth Board of Zoning Appeals, and Ernest W. McVane, in his capacity as the previous Code Enforcement Officer of Cape Elizabeth. We refer to them collectively as "the Town."

genuine issue of material fact with respect to a taking either as a matter of state or federal law.

[¶2] The stipulated facts and procedural history of the present dispute may be summarized as follows: In January of 1989, MC acquired a parcel of land located in Cape Elizabeth that it has held for future development and sale as a single-family house lot. In 1990, Cape Elizabeth amended its zoning ordinance to establish protected wetland zones. As amended, the ordinance prohibits housing development within 250 feet of any critical wetland zone not separated from adjacent areas by topographical or other natural features. In 1996, MC applied for a permit to build a single-family residence on the property, but the application was denied because of the property's proximity to the wetland zone. MC requested a verification of the wetland boundary from the Town's Planning Board, and the Planning Board confirmed the application of the 250 foot buffer overlay on MC's property. MC appealed to the Town's Board of Zoning Appeals and also requested a variance. After a public hearing, however, the Board of Zoning Appeals concluded that it did not have authority to hear the appeal from the Planning Board and refused to grant the variance.

[¶3] MC then initiated an 80B appeal and asserted six independent claims including takings claims under the United States and Maine Constitutions. The Superior Court first ruled on the administrative appeal, upholding the decisions of the Planning Board and the Board of Zoning Appeals. The Town then moved for summary

judgment with regard to the remaining counts. The parties submitted a joint stipulation of facts and acknowledged, among other things, that an appraiser had estimated that MC's property was worth $88,000 as a "buildable" lot and $3000 as a "non-buildable" lot. Based on the stipulated facts, the Superior Court granted the Town's motion for summary judgment. With regard to MC's takings claims, the court reasoned that MC's federal claims were not ripe and that MC's lot had not been deprived of all value because it was not buildable when MC first acquired title and because it retained some economic value. MC appealed, arguing that the court erred in entering summary judgment on its takings claims.

[¶4] Both the United States and the Maine Constitutions prohibit the government from taking private property for public use without paying just compensation.[2] U.S. CONST. amend. V; ME. CONST. art. I, § 21. The ordinary exercise of a state's police powers, especially those relating to environmental protection, often affects interests in realty. The government, however, is not required to pay a property owner every time it enacts a law that adversely affects property interests. As Justice Holmes explained in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "[g]overnment hardly could go on if to some extent

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[2] The final clause of Fifth Amendment of the United States Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Similarly, Article 1, Section 21 of the Maine Constitution provides that "[p]rivate property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." ME. CONST. art. I, § 21.

values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power." *Id.* at 413. This implied limitation, however, is not without limits, and "if regulation goes too far it will be recognized as a taking." *Id.* at 415.

[¶5] The determination of whether a particular enactment has gone "too far" in affecting the interests of a complaining property owner "depends largely 'upon the particular circumstances [of the] case.' " *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958)). Relevant factors to be considered in the determination include "the economic impact of the regulation on the claimant . . . , the extent to which the regulation has interfered with distinct investment-backed expectations . . . , [and] the character of the governmental action." *Id.*

[¶6] These considerations involve what are "essentially ad hoc, factual inquiries" into the relative importance of the private and public interests at stake. *Penn Cent.*, 438 U.S. at 124. Nonetheless, and of particular importance in the present case, there are at least two types of regulatory action, commonly referred to as "categorical takings," that require compensation without such case-specific inquiry: "regulations that compel the property owner to suffer a physical 'invasion' of his [or her] property" and those which "den[y] all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

[¶7] In the present case, relying on the second type of categorical taking, MC argues that, by enacting the 1990 wetlands amendments, the Town has denied it all economically beneficial or productive use of its property. Because MC has the burden of proving its allegations at trial, it must establish a prima facie case for each element of the cause of action in order to survive the Town's motion for summary judgment. *See Champagne v. Mid-Maine Medical Center*, 1998 ME 87, ¶ 9, 711 A.2d 842. If it is clear that the Town would prevail as a matter of law if MC presented nothing more than what was before the court at the hearing on the motion for summary judgment, then the court was correct to enter summary judgment against MC. *See id.* "A judgment as a matter of law in a defendant's favor is proper when any jury verdict for the plaintiff would be based on conjecture or speculation." *Id.* The Town maintains that MC has failed to establish a prima facie case for its takings claims because MC's federal claims are not ripe and because MC has not created a genuine issue of fact that its property has been deprived of all value.

I. RIPENESS

[¶8] As the United States Supreme Court noted in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* at 194. A property owner who maintains that his or her property has been unconstitutionally taken has no claim if the government charged with the taking "has provided an adequate process for obtaining compensation, and if

resort to that process 'yield[s] just compensation.' " *Id.* at 194-95 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984)) (alteration in original). Thus, when a state is charged with a regulatory taking, a property owner's Fifth Amendment takings claim for inverse condemnation does not ripen until he or she has "unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." *Id.* at 195. Accordingly, in *Hamilton Bank*, the Supreme Court determined that a property owner's federal takings claims were premature in federal court because it had not availed itself of the state's statutory procedures for recovering for inverse condemnation. *Id.* at 196-97. Similarly, in *Drake v. Town of Sanford*, 643 A.2d 367 (Me. 1994), we ordered the dismissal of the plaintiffs' federal takings claims because, on the first day of trial, the plaintiffs stipulated to a dismissal of their state takings claims. *Id.* at 369. In applying *Hamilton Bank*, we reasoned that because the plaintiffs had dismissed their state claims, their federal claims could never ripen. *Id.*

[¶9] In the present case, MC has simultaneously asserted takings claims based on federal and state law. Relying on *Hamilton Bank* and *Drake*, the Town maintains that the Superior Court properly disposed of MC's federal takings claims because they are not ripe until MC shows that its state claims for just compensation have been denied. In essence, the Town urges us to require MC to raise its federal claims in a separate proceeding after its state claims have been finally decided. If we did so, however, collateral estoppel would likely preclude the successful assertion of the federal claims in the subsequent action whether brought in state or federal court.

See Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239, 239 (2000); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 66-67 (1995). We conclude that *Drake* does not require such a result.

[¶10] Although state takings claims must be resolved before a federal claim arises, they need not be resolved in separate proceedings in a state court. As a matter of prudence, courts often address federal constitutional issues only after resolving issues arising under the state constitution. *State v. Cadman*, 476 A.2d 1148, 1150 (Me. 1984). Read together, *Hamilton Bank* and *Drake* require only that Maine courts do the same when they address takings claims premised on both federal and state law. The Superior Court erred, therefore, when it dismissed MC's federal claims on the basis of ripeness.

II. LOSS OF ALL BENEFICIAL OR PRODUCTIVE USE

[¶11] In this matter, the state and federal claims require the same analysis. The Town argues that MC has not established a prima facie case for a "categorical taking" because it has not shown that the property has lost all value as a result of the imposition of the wetlands amendments. In the context of a categorical taking, we have explained that "[t]he proper procedure for analyzing taking questions is to determine the value of the property at the time of the governmental restriction and compare that with its value afterwards, to determine whether the diminution, if any, is so substantial as to strip the property of all practical value." *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d

475, 482 (Me. 1982). A property owner fails to prove a categorical federal or state takings claim if he or she fails to show that the governmental action has "rendered the property substantially useless and stripped it of all practical value." *Wyer v. Bd. of Envtl. Prot.*, 2000 ME 45, ¶ 1, 747 A.2d 192; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (recognizing categorical taking when regulation "denies all economically beneficial or productive use of land"). The Town maintains that the ordinance did not render MC's property valueless because, under previously enacted regulations, the property was not buildable before the Town enacted the wetlands amendments and because, based on the stipulated appraisal, the property retains economic value. We consider each of these arguments to determine whether MC has generated a genuine issue of material fact regarding the loss of all value.

A.

[¶12] The Town maintains that the lot was not buildable, under the Town's zoning ordinance, when MC acquired title. The zoning ordinance in effect at that time provided that if a house is to be constructed on a nonconforming lot of record that was created "on or before March 12, 1968," the lot "must contain . . . not less than 20,000 square feet if not to be served by the public sewer (or otherwise meet the requirements of Section 19-3-3 and the State Minimum Lot Size Statute 12 M.R.S.A. § 4807, et. seq.)." Cape Elizabeth, Me., Zoning Ordinance § 19-3-2(b)(4) (January 1989). The parties have stipulated that the property has existed as a lot of record since 1964, that any home constructed on MC's property will require

private sewerage, and that the lot is only 18,570 square feet in area. The issue, therefore, is whether MC has made a prima facie showing that its proposed development "otherwise meet[s] the requirements of Section 19-3-3 and the State Minimum Lot Size Statute 12 M.R.S.A. § 4807, et. seq."

[¶13] The sections referred to establish environmental standards for private subsurface waste disposal systems. Section 19-3-3 of the Town's zoning ordinance required that private sewage disposal systems be "designed and constructed in accordance with the requirements" of the Private Sewage Disposal Ordinance. Zoning Ordinance § 19-3-3. Section 4807-A of the State Minimum Lot Size Statute prohibits any person from disposing of waste "from any single family residential unit by means of subsurface waste disposal unless such lot of land on which such single family residential unit is located contains at least 20,000 square feet." 12 M.R.S.A. § 4807-A (1994). A lot smaller than 20,000 square feet "may be used for subsurface waste disposal if approved in writing by the Department of Human Services." § 4807-B.

> Approval shall be granted if the applicant for approval demonstrates to the Department of Human Services that, based upon [relevant factors], the proposed subsurface waste disposal will not lower the water quality of or otherwise pose a threat to any lake, pond, stream, river or tidal waters, any underground water supply, or to the public health, safety and general welfare.

Id.

[¶14] The parties' stipulation of fact reveals that a professional engineer prepared a Department of Human Services Subsurface Wastewater Disposal System Application but that the Town never approved the application. The engineer certified, for purposes of the DHS application, that the proposed sewer system "is in accordance with the Subsurface Wastewater Disposal Rules." The Town argues, nonetheless, that the lot was not buildable as a matter of law because section 4807-D restricts the application of the Minimum Lot Size Statute to lots created after January 1, 1970. The statute provides:

> This chapter as to the use of a lot for single family residential purposes shall not apply to any lot which prior to January 1, 1970, was specifically described as an identifiable and separate lot either in the instrument conveying such lot to the then owner or in a valid and enforceable agreement for purchase and sale or was shown on a plan recorded in accordance with law, prior to January 1, 1970. . . .

§ 4807-D. The Town is correct that the statute does not apply to lots created before January 1, 1970, and that the exception provided in section 4807-B for lots smaller than 20,000 square feet does not apply to MC's lot.

[¶15] It is only the Town's ordinance, in this case, that provides an exception to the ordinance's lot size requirements. The ordinance adopts the "requirements" of the State Minimum Lot Size Statute by reference, but does not limit its applicability to lots created after 1970. No evidence, however, was presented concerning the lot's compliance with section 19-3-3, and, thus, MC failed

to present a prima facie case that the lot was buildable before the enactment of the wetlands ordinance.

B.

[¶16] The Town also argues that MC has not established a prima facie case for a categorical taking because it has not shown that the property has lost all value as a result of the imposition of the wetlands amendments. Whether a categorical taking has occurred by virtue of a landowner being deprived of all economically viable use of his or her property is a predominantly factual question. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999). However, the only evidence that MC provided in the summary judgment proceedings to demonstrate the adverse effect of the wetlands amendments on the value of its property was an appraiser's estimate that, after the amendment, the property is worth $88,000 as a "buildable" lot and $3000 as a "non-buildable" lot. This evidence does not support a finding of a categorical taking. The appraisal does not even purport to establish the value of the lot prior to the alleged taking, nor does it address whether the lot retains substantial uses other than to support a single-family residence.

The entry is:

> Judgment dismissing the federal claim vacated. Remanded for entry of judgment in favor of the Town on the federal claim. In all other respects, the judgment is affirmed.

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STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-97-059

MC ASSOCIATES,

Plaintiff

vs.

INHABITANTS OF THE TOWN OF CAPE ELIZABETH, et al.,

Defendants

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The defendants seek a summary judgment on all counts (count II: due process; count III: promissory estoppel; count IV; taking; count V: void as excessive regulation; count VI: declaratory judgment; count VII: injunctive relief) of the plaintiff's complaint. For the following reasons, the motion is granted.

By decision filed 7/16/98, the superior court affirmed the decisions of the Cape Elizabeth Planning Board and Zoning Board of Appeals, which were the subject of the plaintiff's Rule 80B appeal in count I of the second amended complaint. *See Sprague v. Washburn*, 447 A.2d 784, 786-87 (Me. 1982) (law of case).

In the decision and order on the plaintiff's Rule 80B complaint, the court determined that the Planning Board did not err in determining that the boundary of the RPI-CWZ wetland at issue in this case was north of the Dyer Road. The court further determined that the Zoning Board of Appeals did not err in declining to hear the plaintiff's administrative appeal from the Planning Board's decision. Finally, the court determined that the Zoning Board of Appeals did not err in denying the

plaintiff's request for a variance. *See* Decision and Order filed 7/16/98.

It is undisputed that the plaintiff's parcel contains less than 20,000 square feet and that any home constructed will require private sewerage. *See* Stipulation of Facts, ¶¶ 5-6. As of the date the plaintiff acquired the parcel which is the subject of this lawsuit, the parcel was too small for any proposed residential construction pursuant to the Town's ordinance then in effect. *See* Stipulation of Facts, ¶¶ 1, 4-6, 40. The fact that Mitchell Cope, general partner of the plaintiff, was involved in other entities that owned the parcel since 1964 does not affect that conclusion. *See* Stipulation of Facts, ¶¶ 39-41; *see also* 12 M.R.S.A. § 4807-D (1994). Accordingly, all of the plaintiff's claims fail.

COUNT II: DUE PROCESS

The plaintiff has abandoned its challenge to the adequacy of the notice it received regarding the rezoning. *See* Pl.'s Mem. at 10; *Crispin v. Town of Scarborough*, 1999 ME 112, ¶ 18, 736 A.2d 241, 247 (adoption and amendment of zoning ordinances are legislative actions); Stipulation of Facts, ¶¶ 7-9. On this record, there was no due process violation. *See Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475, 483 (Me. 1982); *see also F.S. Plummer Co., Inc. v. Town of Cape Elizabeth*, 612 A.2d 856, 859-60 (Me. 1992); Decision and Order filed 7/16/98.

COUNT III: PROMISSORY ESTOPPEL

The plaintiff admits that the Town has never made any promises about the buildability of the parcel which is the subject of this lawsuit. *See* Stipulation of Facts, ¶ 33; *Cottle Enterprises, Inc. v. Town of Farmington* 1997 ME 78, ¶ 17, 693 A.2d 330, 335-36 & n.6

COUNTS IV & V: TAKING & VOID AS EXCESSIVE REGULATION

The plaintiff's federal just compensation claim is premature. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985); *Drake v. Town of Sanford*, 643 A.2d 367, 369 (Me. 1994). With regard to the plaintiff's state claim of inverse condemnation, the wetlands provisions at issue in this case serve a legitimate public interest. *See F.S. Plummer*, 612 A.2d at 860 (protection of environment and water quality valid object of exercise of police power). Further, the plaintiff's property continues to have value. *See* Stipulation of Facts, ¶ 52; *see also Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 645-46 (1993) (reasonable investment-backed expectations); Stipulation of Facts, ¶ 42.

COUNTS VI & VII: DECLARATORY JUDGMENT & INJUNCTIVE RELIEF

The court presumes that the ordinance is constitutional. *See Warren v. Municipal Officers of Town of Gorham*, 431 A.2d 624, 628 (Me. 1981). There is no clear and irrefutable evidence on this record that the ordinance is

invalid. *See F.S. Plummer*, 612 A.2d at 859-60; *Warren*, 431 A.2d at 628-29.

The entry is

The Defendants' Motion for Summary Judgment is GRANTED. Judgment is entered in favor of the Defendants and against the Plaintiff on Counts II-VII of the Plaintiff's Second Amended Complaint.

Date: August 27, 2000

/s/ Nancy Mills
Nancy Mills
Justice, Superior Court

CUM AP-97-059

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-97-059

MC ASSOCIATES,

PLAINTIFF

vs.

DECISION AND ORDER

INHABITANTS OF
CAPE ELIZABETH,

DEFENDANTS

The plaintiff appeals, pursuant to M.R. Civ. P. 80B, the Planning Board's determination that the boundary of the RPI-CWZ wetland at issue in this case was north of the Dyer Road and the Zoning Board of Appeals' refusal to hear the plaintiff's administrative appeal and denial of the request for a variance. For the following reasons, the plaintiff's appeal is denied.

RP1 ZONE and BUFFER

The plaintiff argues that the Planning Board erred in determining that the area north of the Dyer Road was a RP-1 wetland as opposed to an RP-1 wetland because the Planning Board missapplied the criteria in § 19-2-8-01 of the Zoning Ordinance. (A-13-14.) The defendants argue that there is evidence in the record to support the finding that the area in question is an extension of the RP-1. (*See, e.g.*, R. 21; 73-75; A-11 [Wetland Upper Edge].) The defendants also argue that even if it was unreasonable to determine that the area was a RP-1 wetland, the record supports the conclusion that § 19-3-9-06(1) requires a 250', and not a 100', buffer, which precludes the plaintiff's

building the proposed residence. (A-23.) The court agrees. (*See, e.g.*, R. 65-66; 75; *see Power v. Shapleigh*, 606 A.2d 1048, 1050 (Me. 1992) (record before Board must compel contrary finding).)

ADMINISTRATIVE APPEAL

The plaintiff argues further that ZBA erred in determining that it did not have jurisdiction to hear the plaintiff's administrative appeal from the Planning Board's decision. (*See* Zoning Ordinance § 19-4-7(a)(1); A-26; *see also* § 19-5-2(A), attached to Defs.' Mem.; R 136.) The Ordinance provides for an appeal to the Superior Court from a decision of the Planning Board (Zoning Ordinance § 16-3-6(a); Defs.' Mem. 9-10[1]) and for an administrative appeal to the ZBA from a decision of the Code Enforcement officer. (Zoning Ordinance § 19-5-2(A); § 19-5-3.) The ZBA did not err in declining to hear the plaintiff's appeal.

VARIANCE

The plaintiff argues finally that the ZBA erred in denying the plaintiff's request for a variance. The 250' buffer is mandatory. (A-28, 32.) Single-family residences are not permitted in the RP1-CWZ and buffer. (Zoning Ordinance § 19-2-8-02; A-15; *see also* Table 19-6-9 attached to Defs.' Mem.) A variance shall not be granted to permit

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[1] This provision does not appear in the record or attachments to the memoranda. The court relies on the defendants' memorandum.

a use or structure otherwise prohibited. (Zoning Ordinance § 19-4-7(a)(2); A-27; *see also* § 19-5-2(B) attached to Defs.' Mem.) The ZBA correctly noted that it cannot change a mandatory boundary or grant a use variance. (R. 139.)

The entry is

> The decisions of the Cape Elizabeth Planning Board and Zoning Board of Appeals are AFFIRMED.

Date: July 16, 1998

/s/ Nancy Mills
Nancy Mills
Justice, Superior Court

AP-97-059

STATE OF MAINE
CUMBERLAND, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Docket No. Cum-00-493

MC ASSOCIATES,

Plaintiff

v.

ORDER

TOWN OF CAPE ELIZABETH, et al.,

Defendants

Upon motion of appellant for reconsideration.

It is ORDERED that the motion be, and it hereby is, DENIED. The mandate shall issue forthwith.

Dated: July 26, 2001

For the Court,

/s/ Daniel E. Wathen
Chief Justice

STATE OF MAINE
CUMBERLAND, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. CUM-00-493

MC ASSOCIATES, a Maine Limited Partnership,

Appellant,

vs.

TOWN OF CAPE ELIZABETH, the TOWN COUNCIL of CAPE ELIZABETH, the CAPE ELIZABETH PLANNING BOARD, CAPE ELIZABETH BOARD OF ZONING APPEALS, and ERNEST W. McVANE, in his capacity as the previous Code Enforcement Officer of Cape Elizabeth, County of Cumberland and State of Maine,

Appellees.

MOTION FOR CONSIDERATION AND INCORPORATED MEMORANDUM

NOTICE

ALL MATTERS IN OPPOSITION TO THIS MOTION MUST BE FILED NO LATER THAN SEVEN (7) DAYS AFTER THE FILING OF THIS MOTION UNLESS ANOTHER TIME IS PROVIDED BY THE MAINE RULES OF CIVIL PROCEDURE, OR SET BY THE COURT, FURTHER, FAILURE TO FILE A TIMELY OPPOSITION WILL BE DEEMED A WAIVER OF ALL OBJECTIONS TO THIS MOTION, AND THIS MOTION MAY THEN BE GRANTED WITHOUT FURTHER NOTICE.

MC Associates, by and through its undersigned counsel of record, Frank K. N. Chowdry, Esq., of the law

firm Hopkinson, Abbondanza & Backer, P.A., **MOVES** this Honorable Court for Reconsideration pursuant to M.R.Civ.Pro 76A(b) of its Decision and Ruling on the Appeal of MC Associates entered June 15, 2001, and states as follows:

1. Pursuant to Maine's Rules of Civil Procedure, Rule 76A(b) and/or Maine's newly adopted Rules of Appellate Procedure, Rule 14(b), MC Associates, plaintiff/appellants in the above captioned matter, do, by the timely filing of this motion, request the Maine Supreme Judicial Court to reconsider its decision in this case handed down on June 15, 2001.

2. As required by the rule, the original motion, and the requisite number of copies (7) of this motion, were filed on June 29, 2001 (within the 14 days allowed) with the Clerk of the Law Court.

3. This reconsideration is warranted by the United States Supreme Court's holding in *Palazzolo v. Rhode Island, et al.*, 533 U.S. ___ (2001) (Doc. No. 99-2047, decided June 28, 2001). The *Palazzolo* case raised and disposed of issues similar to, if not identical with, issues raised in *MC Associates;* in plaintiff/appellant's view the *Palazzolo* holding can, and should, inform this Court's final disposition of the pending matter.

4. Plaintiff/appellant's would raise three separate issues in this motion for reconsideration; in an attached supporting Memorandum of Law brief argument will be offered with respect to each issue raised; and finally, a Conclusion suggesting modification of this court's original holding in this case and alternative measures of relief which seem appropriate to plaintiff/appellants in light of

Palazzolo and the arguments presented will be respectfully offered.

ISSUES PRESENTED

I. When a regulating body, Cape Elizabeth, has made it clear (relying upon its interpretation of minimum lot size and/or wetlands statutes or ordinances) that it will not under a[ny] [sic] circumstances issue a building permit to an applicant such as MC Associates, does the doctrine of ripeness require the applicant to nonetheless tender applications for, or actually obtain, collateral permits that would only be necessary to facilitate actual construction?

Palazzolo answers this question, No.

II. Does the fact that a lot owner such as MC Associates (a lot owner that has held title to the subject parcel in one legal form or another from 1964 to the present) acquired its present ownership interest after enactment of minimum lot size and/or wetlands regulation prejudice the applicants right to challenge the constitutionality of these regulations?

Palazzolo answers this question, No.

III. Do minimum lot size and/or wetlands regulations that according to the only evidence in the record (evidence not disputed or controverted by the town) diminishes the value of the lot in question in these proceedings from $88,000 as a buildable lot, to $3,000 as a non-buildable lot constitute a taking?

Palazzolo strongly suggests the answer to this question is, Yes.

SUPPORTING MEMORANDUM OF LAW

I. When a regulating body, Cape Elizabeth, has made it clear (relying upon its interpretation of minimum lot size and/or wetlands statutes or ordinances) that it will not under any circumstances issue a building permit to an applicant such as MC Associates, does the doctrine of ripeness require the applicant to nonetheless tender applications for, or actually obtain, collateral permits that would only be necessary to facilitate actual construction?

The short answer here is NO; and the reasoning of *Palazzolo* would also suggest the answer is NO. In its June 15, 2001 opinion, the Law Court's initial discussion of ripeness (slip opinion at 2-3) seems to concede (hold) that MC's state and federal takings claims were both ripe for disposition. This view would certainly accord with the U.S. Supreme Court's recent holding in *Palazzolo v. Rhode Island, et al.*, 533 U.S. ___ (2001) which, relying on *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738 (1997) and *Monterey v. Del Monte Dunes*, 526 U.S. 687, 698 (1999), found Rhode Island's pronouncements unequivocally barring any filling of wetlands (and thus development of and/or within the wetland) sufficiently final to meet the ripeness requirements of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 (U.S. 172 (1985). In the instant proceeding, the Town of Cape Elizabeth's unequivocal pronouncements that it would not issue a building permit to MC Associates, that both minimum lot size and wetlands regulations (individually, and/or taken together) barred issuance of the permit

seems similarly final and definite; these firm pronouncements, as in *Palazzolo*, would certainly seem sufficient to overcome any ripeness barriers.

The *Palazzolo* court also noted that a case meeting the threshold requirements for ripeness does not become unripe merely because the buildable or non-buildable value of the lot in question (contrary to evidence in the record) is questioned. And finally, the *Palazzolo* court noted that an otherwise ripe case does not become unripe because the applicant fails to apply for and obtain collateral permits and/or variances that he may not need or want, that almost certainly will not be granted, and that even if granted will not allow him to actually build. On the latter point the court said: " . . . federal ripeness rules do not require the submission of further and futile applications with other agencies." (*Palazzolo* slip opinion at 16).

Applying the reasoning of *Palazzolo* to the facts of this case suggests that MC Associates has met the ripeness requirements of the law; this court's June 15th opinion, however, though seemingly in agreement erects three threshold-type, ripeness-type barriers to sustain the town's motion for summary judgment and bar itself from reaching the merits of MC's takings claim. First, the court agrees with the town that the lot in question was not buildable even before adoption of the wetlands ordinance; second, the court holds that: "No evidence . . . was presented concerning the lot's compliance with section 19-3-3, and thus, MC failed to present a prima facie case that the lot was buildable . . . " (slip opinion at 5); and third, the court accepts the town's argument that

MC's valuation evidence did not establish a prima facie case for a taking.

Each of these findings seem erroneous as a matter of law, or are at odds with the record and the U.S. Supreme Court's holding in *Palazzolo*. As to whether the lot was ever buildable clearly it was. All of the parties agree, the lot in question was of record in 1964 long before any minimum lot size or wetlands regulations were in place; but for these regulations the lot would sooner or later be built upon (as have almost of all of the other lots in the immediate vicinity of this lot). The non-buildable assertion turns on a curious interpretation of the states minimum lot size statute, 12 MRSA §4807-D. The town and the court seem to read this provision as one creating a narrow "exception" allowing some lots of less than 20,000 square feet (only those created after January 1, 1970) to be built upon if they meet state subsurface waste disposal requirements. But §4807-B already allows any lot of less than 20,00 square feet that meets these requirements to be built upon. Moreover §4807-D does not create an exception – it creates a total **exemption**, and **exemption** from minimum lot size requirements for lots of record created prior to January 1, 1970. MC Associates' lot qualifies for this **exemption**. The fact that MC did not seek to avail itself of this **exemption** but instead sought to demonstrate that it could and would meet environmentally more appropriate subsurface waste disposal standards should not become a disadvantage, and certainly does not make the lot unbuildable under either the state or the town's minimum lot size requirements – on the contrary, it's a buildable lot because it's expressly **exempt** from these

regulations. It's also a buildable lot because MC Associates can, is willing, and chooses to meet the requirements of §4807-B for building on lots of less than 20,000 square feet.

The second barrier raised by this court, that there was no evidence as to compliance with section 19-3-3 and 12 MRSA §4807 et. seq. is refuted by the record, (see slip opinion, pg. 4 para. #14). The only evidence in the record on this point shows that a professional engineer on behalf of MC Associates prepared an application (directed at both the town and the State Department of Human Services) that certified that the proposed sewer system, " . . . is in accordance with the Subsurface Wastewater Disposal Rules." The fact that the town was unwilling to approve the application shows only that it was adamant in its refusal to allow building on this lot. The fact that MC Associates did not pursue its DHS application to finality shows only that it cut short what would have been a futile and meaningless step – a step deemed unnecessary by the *Palazzolo* court – getting this permit would not have allowed MC to build. The town on the other hand offered no evidence that the engineers findings were incorrect; it offered no evidence as to why it's code enforcement officer refused to approve the application. It simply asserts (and this court seems to accept) that no evidence was presented showing compliance with 19-3-3 and 12 MRSA 4807 et. seq. That simply is not true.

The third barrier raised by the town and seemingly accepted by this court, that the valuation evidence presented by MC Associates did not establish a prima facie case for a taking is again refuted by the record. The only

competent evidence in the record with respect to valuation was prepared for and presented by MC Associates. It is unrefuted. As a body of evidence, it speaks for itself and clearly meets the dictionary definition of prima facie evidence; the numbers with respect to valuation ($88,000) as a buildable lot and ($3,000) as an unbuildable lot were not challenged in any way by the town; the town presented no competing or alternative valuation evidence of its own – none; the town did not challenge the credentials of the appraiser. Given these evidentiary omissions on the part of the town, and given the magnitude of the diminution in value that was shown, it [sic] seem incredible for the town to assert (and for this court to accept) the proposition that not even a prima facie case of taking was made – a case that would at least survive the town's motion for summary judgment, which as matters now stand has been sustained by this court. Finally on this point, it is worth noting that the holding in *Palazzolo* did not allow the governmental body (Rhode Island) to avoid the valuation numbers it implicitly accepted for purposes of argument; *Palazzolo* also found that the evidence as to diminution in value though not conclusive on the question of whether there was a taking was at least sufficient to remand the case to the state court to determine whether a taking had occurred. The evidence presented here is no less compelling; a similar disposition here would thus seem appropriate.

II. Does the fact that a lot owner such as MC Associates (a lot owner that has held title to the subject parcel in one legal form or another from 1964 to the present) acquired its present ownership interest after enactment of minimum lot size and/or wetlands regulations prejudice the applicants right to challenge the constitutionality of these regulations?

The short answer here is NO. The short answer of the *Palazzolo* court is NO. This court's June 15th opinion did not address this aspect of the town's argument directly, but the lower court seemed to accept the view that because MC Associates acquired its present ownership interest after the town's enactments, it was bound by these provisions; it could not raise taking challenges (see pg. 2 of the Superior Court's Aug. 27, 2000 order). On the strength of *Palazzolo's* holding and reasoning, this view, this limitation on taking challenges must now be firmly rejected (see *Palazzolo* slip opinion at 16-21). Relying on reasoning first laid out in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987), the *Palazzolo* court makes clear that takings challenges may be brought by former owners of a property or present owners at whatever point in time they directly confront regulations that arguably go "too far" and thus constitute a "regulatory taking" as defined by *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

If this court's affirmance of the lower court's grant of summary judgment for the town was influenced at all by these now rejected limitations on MC's right to bring a takings claim, a reconsideration of its June 15th disposition would seem appropriate.

III. Do minimum lot size and/or wetlands regulations that according to the only evidence in the record (evidence not disputed or controverted by the town) diminishes the value of the lot in question in these proceedings from $88,000 as a buildable lot, to $3,000 as a non-buildable lot constitute a taking?

Palazzolo strongly suggests the answer to this question is, YES. This derives from the court's reasoning that when the residual value (after-regulation value) of a property is so close to zero, albeit not actually zero, a categorical taking within the framework of *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) has occurred. Speaking to this very point, the *Palazzolo* court says: " . . . a state may not evade the duty to compensate on the premise that the landowner is left with a token interest." (See *Palazzolo* slip opinion at 21). Having said this, however, the facts confronting the *Palazzolo* court, i.e. a residual value of at least $200,000 prompted the court to remand the case to the state court to determine what the realistic buildable value of the parcel was, and whether a taking (not under the rationale of *Lucas* but under the rationale of *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978)) had occurred.

In its June 15th opinion this court's discussion of takings and diminution of value (see slip opinion at 3) drawing on prior Maine cases such as *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n,* 450 A2d 475 (Me. 1982) and *Wyer v. Bd. of Envtl. Prot.,* 747 A2d 192 (Me. 2000) also seems to recognize that a taking (even a *Lucas*-type of categorical taking) can occur if a regulation

leaves a property **"substantially"** useless, or strips it of "all **practical** value".

These terms do not suggest that the diminution in value must literally be to zero for there to be a categorical taking – a categorical taking may seemingly be found where what remains by way of residual value is so small as to be tantamount to zero. That clearly is the view of the *Palazzolo* court; that seemed to be the view of this court and dictated MC Associates initial approach to this issue. It is a view subscribed to by other courts, see *French Inv. Co. v. City of New York*, 39 NY2d 587 (1976) (a taking was deemed to have occurred when regulation " . . . destroys [a property's] economic value, **or all but a bare residue of its value**."). Once again, the fact that some value remains does not mean there has not been a taking, perhaps even a "categorical taking".

But even if this court determines that the residual value in this case ($3,000 as an unbuildable lot) is high enough to take it out of the *Lucas* categorical taking class of cases, it would seem that at the very least (the diminution in value here being as great as it is) that this case should be remanded to the trial court (in the same manner that *Palazzolo* was remanded) to determine whether a taking under the more liberal balancing of interests standards of *Penn Central* has occurred.

Conclusion

For any or all of the reasons stated above, and particularly in light of the United States Supreme Court's recent holding in *Palazzolo*, MC Associates respectfully asks this court to reconsider its affirmance of the lower

court's grant of summary judgment for the town. Upon reconsideration we would ask this court to modify its June 15th holding – a buildable lot exists – regulations preventing use of that lot have been imposed – a taking has occurred. We would respectfully ask this court to so hold.

DATED this 29th day of June, 2001.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion for Reconsideration was served by hand delivering a copy of the foregoing document, which was placed in a sealed envelope, at the offices of Monaghan Leahy Hochadel & Libby, LLP and addressed as follows:

John J. Wall, III, Esq.
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DATED at Portland, Maine this 29th day of June, 2001.

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Supreme Court, U.S.
FILED
NOV 21 2001
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(2)

No. 01-655

In The

Supreme Court of the United States

MC ASSOCIATES,

Petitioner,

v.

INHABITANTS OF THE TOWN OF CAPE ELIZABETH, CAPE ELIZABETH TOWN COUNCIL, CAPE ELIZABETH PLANNING BOARD, CAPE ELIZABETH ZONING BOARD OF APPEALS, AND CAPE ELIZABETH CODE ENFORCEMENT OFFICER,

Respondents.

On Petition For Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Maine Supreme Judicial Court's finding that the 1990 wetland ordinance did not deprive the Petitioner of a property interest turned on the timing of ownership of the subject parcel?

2. Whether the stipulated facts support the Maine Supreme Judicial Court's conclusion that the subject parcel was not deprived of all economically viable use?

3. Whether the stipulated facts support the Maine Supreme Judicial Court's conclusion that the Petitioner failed to present sufficient evidence to support a takings claim under state or federal law?

4. Whether the Petitioner's claims were rejected by the Maine Supreme Judicial Court on the grounds that the dispute was not ripe for adjudication?

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CAPE ELIZABETH'S BRIEF IN OPPOSITION

Respondents Inhabitants of the Town of Cape Elizabeth, Cape Elizabeth Town Council, Cape Elizabeth Planning Board, Cape Elizabeth Zoning Board of Appeals, and Cape Elizabeth Code Enforcement Officer (collectively "Cape Elizabeth") respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the Decision and Judgment of the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court") issued on June 15, 2001, which is reproduced in the Appendix to the Petition ("P.A.") at App. 1 and was reported at *MC Associates v. Town of Cape Elizabeth*, 773 A.2d 439 (Me. 2001). The Petitioner's efforts to recast this case for the purposes of the Petition are unavailing and the Court should reject the Petitioner's request for review.

The dispute in this case did not present the Law Court with any novel constitutional issues. After holding that the Petitioner's state and federal takings claims were ripe for decision, the Law Court ruled that the stipulated record did not support either claim. In particular, the Law Court held that the 1990 wetland ordinance passed by the Town of Cape Elizabeth did not deprive the Petitioner of all economically viable use of the subject parcel. It noted that the Petitioner failed to demonstrate that the subject parcel could have been used to build a single-family home before 1990 or that the 1990 ordinance adversely affected the value of the subject parcel. In reaching its conclusion, the Law Court construed relevant provisions of state law and the Town's ordinance.

The Petitioner limited its constitutional challenge to the regulatory effect of the Town of Cape Elizabeth's 1990 wetland ordinance. At no time prior to the filing of the Petition did the Petitioner suggest that any other regulation by the Town worked a taking of the subject parcel. In addition, the Law Court did not rule that the Petitioner was barred from asserting a takings claim on the ground that it acquired the subject parcel after the regulation took effect. The Petitioner's efforts to raise new issues in this Petition should not be rewarded with a Writ of Certiorari.

STATEMENT OF THE CASE

The dispute in this case involves an 18,570 square foot parcel of land situated in Cape Elizabeth, Maine. The Petitioner acquired the subject parcel by a deed dated January 11, 1989. (Stipulation of Facts ¶¶ 1 & 6) (hereafter "SF ¶ ___").[1] The Petitioner did not pay any money to acquire the property. *Id.* ¶ 3. In fact, the Petitioner is unaware whether its predecessors-in-interest paid for the property and, if so, what amounts were paid. *Id.* It is undisputed that the subject parcel was a lot of record prior to 1968. *Id.* ¶ 40.

As of January 11, 1989, the Town's ordinance would not have allowed the construction of a single-family

[1] Citations are to the Stipulation of Facts that the parties submitted to the Maine Superior Court. For the Court's convenience, a copy of the Stipulation is attached to this brief as an Appendix.

house on the lot. *Id.* ¶ 4. The ordinance requires at least 20,000 square feet of lot area for any proposed residential construction that depends upon private sewerage. *Id.* ¶ 4 (Smith Aff. ¶ 3 & Exh. 1). It is undisputed that any home constructed on the subject parcel would require private sewerage. *Id.* ¶ 5.

On April 9, 1990, the Cape Elizabeth Town Council voted to enact amendments to its land use ordinance establishing three wetland zones: critical wetland district, critical wetland buffer, and wetland protection district. *Id.* ¶ 7 (hereafter "the 1990 wetlands ordinance" or "the 1990 ordinance"). The purpose of the 1990 ordinance was to further the comprehensive plan by promoting "the health, safety and general welfare of its residents." *Id.* ¶ 10 (Smith Aff. ¶ 4 & Exh. 2 (Ch. 19, sec. 19-1-2)). In relevant part, the Town sought to: "encourage the most appropriate use of land throughout the Town[,] . . . to promote the coordinated development of unbuilt areas[,] . . . [and] to conserve natural resources." *Id.* ¶ 10 (Smith Aff. ¶ 4 & Exh. 2 (Ch. 19, sec. 19-1-2)). With respect to the wetland protection provisions in particular, the 1990 ordinance provides:

> The wetlands of the Town of Cape Elizabeth are fragile natural resources which provide for wildlife habitat, pollution control, storage and passage of flood waters, aquifer recharge, erosion control, education, scientific study, recreation and open space. Considerable wetland acreage nationally has been lost or impaired by drainage, dredging, filling, excavating, building, polluting, and other activities inconsistent with the natural uses of such areas. Therefore, it is the policy of the Town of Cape Elizabeth to

> ensure that wetlands are protected from detrimental impacts and that wetland alteration activities do not threaten public safety, welfare or cause nuisances, or negatively alter natural wetland ecology.

Id. ¶ 10 (Smith Aff. ¶ 4 & Exh. 2 (Ch. 19, sec. 19-3-9-01)).

The 1990 wetland ordinance, which became effective on May 9, 1990, provides that no development of houses can occur in critical wetland districts. *Id.* ¶ 17. Moreover, in relevant part, the amendment forbade development of houses within 250 feet of any critical wetland district that is not separated from adjacent areas by topography or other natural features. *Id.* ¶ 18.[2]

In March of 1996, the Petitioner submitted to the Town's Code Enforcement Officer a building permit application to construct a single-family residence on the subject parcel. *Id.* ¶ 19. The CEO denied the application on April 10, 1996. *Id.* ¶ 19. The Petitioner submitted additional materials in support of its application by a letter dated May 10, 1996. *Id.* ¶ 20. The CEO again denied the Petitioner's application. *Id.* ¶ 21.

The Petitioner requested a verification of the wetland boundary. *Id.* ¶ 22. The Town Planning Board received a

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[2] These provisions remained substantively unchanged when the Petitioner requested a building permit in March of 1996. For ease of reference, it should be noted that the zones received new nomenclature in the interim period. Specifically, the critical wetland zones were renamed "Resource Protection 1 – Critical Wetland Zones" ("RP-1"), the buffer zones renamed "Resource Protection 1 – Critical Wetland Buffer" ("RP-1 Buffer"), and the wetland protection zones renamed "Resource Protection 2 – Wetland Protection Zones" ("RP-2").

substantial amount of information on the location of the boundary and held a public hearing. *Id.* ¶ 23. The Planning Board concluded that the RP-1 zone included areas both south and north of Dyer Pond Road. *Id.* ¶ 24. This decision was affirmed by the Maine Superior Court. *Id.* ¶ 25 (Decision and Order at 1-2 (July 16, 1998)). The effect of the Superior Court's decision was to confirm the application of the 250 foot buffer overlay on the Petitioner's property. *Id.* ¶ 26.

On August 6, 1997, the Petitioner "appealed" the Planning Board's decision to the Town Zoning Board of Appeals. *Id.* ¶ 27. At the same time, the Petitioner requested that the Zoning Appeals Board grant it a variance with respect to the 250 foot buffer zone. *Id.* ¶ 28. After a public hearing on August 26, 1997, the Zoning Appeals Board ruled that it had no authority to hear the appeal from the Planning Board and that it could not grant a variance that contradicted the uses permitted in the RP-1 Buffer Zone. *Id.* ¶ 29. The Superior Court also affirmed these findings by the Zoning Appeals Board. *Id.* ¶ 30 (Decision and Order at 1-2 (July 16, 1998)).

According to the Petitioner, the subject parcel has some value notwithstanding the Town's ordinance. *Id.* ¶ 31. The record reflects that the subject parcel is worth at least $3,000. *Id.* ¶ 32. However, the record is devoid of any evidence to establish the value of the parcel before the 1990 ordinance was enacted. Moreover, the stipulated facts do not establish, as the Petitioner suggests, that the subject parcel may only be used to construct a single-family house.

REASONS FOR DENIAL OF THE WRIT

The Petitioner has not articulated a viable basis for review by this Court. It has not demonstrated any conflict between the holdings of this Court and the decision of the Law Court. The Law Court affirmed summary judgment based on a stipulated record that did not support any constitutional claims. This Court should decline to issue a Writ.

I. THE MAINE SUPREME JUDICIAL COURT DID NOT BAR THE PETITIONER'S STATE AND FEDERAL TAKINGS CLAIMS ON THE GROUND THAT IT ACQUIRED THE SUBJECT PARCEL AFTER THE 1990 ORDINANCE TOOK EFFECT.

Relying upon the principal holding of *Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001), the Petitioner suggests that the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court"), erroneously barred his state and federal takings claims. To support this argument, the Petitioner maintains that the Town of Cape Elizabeth's *ordinances* – including, it appears, a minimum lot size ordinance enacted in 1968 – prevent development of the subject parcel.

A plain reading of the record below and the Law Court's decision demonstrates that the Petitioner's argument is unfounded. As reflected in the Petitioner's Second Amended Complaint, summary judgment memorandum, and appellate brief to the Law Court, the Petitioner did not challenge the constitutionality of the minimum lot size ordinance passed in 1968. Its claims in this case were premised on the allegation that the 1990

wetland ordinance effected a taking without just compensation under state and federal law. Therefore, the Petitioner's persistent references to the effect of "the regulations" represent a newly raised issue that is not appropriate for review. *See Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari.").

In addition, the Law Court did not rule that the Petitioner was barred from pursuing its state and federal takings claims based on the temporal relationship between its acquisition of the subject parcel and the enactment of the 1990 ordinance. Since there is no dispute that the Petitioner purchased the parcel before the ordinance was passed, it is hardly surprising that the Law Court did not make any reference to the issue that was raised in *Palazzolo*. The Law Court held that the 1990 ordinance did not effect a taking of property without just compensation because the Petitioner could not establish that the ordinance affected the "buildability" of the subject parcel. No issue was raised below with respect to an absolute bar, and the Law Court did not decide such an issue. There is no conflict between the Law Court's decision and *Palazzolo*.

II. THE STIPULATED FACTS SUPPORT THE MAINE SUPREME JUDICIAL COURT'S CONCLUSION THAT THE SUBJECT PARCEL WAS NOT DEPRIVED OF ALL ECONOMICALLY VIABLE USE.

The Petitioner argues that the diminution in value of the subject parcel caused by the 1990 wetland ordinance is so substantial, so close to rendering the parcel's residual value to zero, that a categorical taking has occurred. The stipulated facts however, show that the property retains a value of at least $3,000. This Court has previously held that "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prod. of California v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S.Ct. 114, 117, 71 L. Ed. 303 (1926)). Here, as the Law Court pointed out, the stipulated record "does not even purport to establish the value of the lot prior to the alleged taking, nor does it address whether the lot retains substantial uses other than to support a single-family residence." (P.A. at App. 11). The Petitioner failed to meet its burden of proof with respect to a categorical taking. The stipulated facts support the Law Court's decision and its legal analysis is consistent with this Court's decision in *Palazzolo*.

III. THE STIPULATED FACTS SUPPORT THE MAINE SUPREME JUDICIAL COURT'S CONCLUSION THAT PETITIONER FAILED TO MAKE A PRIMA FACIE CASE OF AN UNCONSTITUTIONAL TAKING UNDER STATE OR FEDERAL LAW.

The Law Court affirmed summary judgment against the Petitioner on its state and federal takings claims, which included both the categorical takings analysis and the analysis set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). (P.A. at App. 11). While the Law Court dispensed with the Petitioner's claims without a great deal of discussion of *Penn Central*, the Law Court clearly considered the case. In its decision, the Law Court cited *Penn Central* and *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475 (Me. 1982), a Maine case that applies *Penn Central* to state and federal takings claims. The Law Court's rejection of the Petitioner's state law inverse condemnation claim effectively resolved any question that had been raised under *Penn Central*.

In any event, the present case is easily distinguishable from *Palazzolo* on this issue. In *Palazzolo*, the Rhode Island Supreme Court held the property owner's claim for a taking under the *Penn Central* analysis was barred because his acquisition postdated the regulation. The Rhode Island Court did not evaluate the diminution of value reflected by the record evidence to test the property owner's claim. By contrast, the Law Court did not bar the Petitioner's claim. Rather, it decided on the merits that "MC failed to present a prima facie case that the lot was

buildable before the enactment of the [1990] wetlands ordinance." (P.A. at App. 10-11). In other words, if the subject parcel could not have been used to construct a single-family residence before the enactment of the 1990 wetland ordinance, then the 1990 wetland ordinance could not have defeated the Petitioner's reasonable investment-backed expectations. The Petitioner failed to present any evidence that the parcel complied with the Town's Private Sewage Disposal Ordinance for development of lots that did not meet the minimum lot size. Therefore, the Petitioner failed in its burden of proof to show that the 1990 wetland ordinance deprived it of any rights it had prior to the enactment of the 1990 ordinance. Since the Law Court's decision on the merits is supported by the stipulated facts and consistent with this Court's decision in *Palazzolo*, the Court should deny the Petition.

IV. THE MAINE SUPREME JUDICIAL COURT DID NOT DENY THE PETITIONER'S APPEAL ON THE GROUNDS OF RIPENESS.

The Petitioner confuses resolution on the merits for justiciability. The Law Court held in the Petitioner's favor when it determined that its claims were ripe for review. Nonetheless, the Petitioner suggests that the Law Court erected "ripeness-type barriers" that are inconsistent with *Palazzolo*. These so-called barriers are actually the application of law to the stipulated facts.

The Petitioner takes issue with three of the Law Court's findings – all of which represent a resolution on the merits. First, the Law Court properly determined that the 1990 ordinance did not affect the use of the subject

parcel as a buildable lot. As a matter of state and local law, the subject parcel could not be used to erect a single-family house since 1968, when the lot-size ordinance was enacted. The Law Court's construction of these state and local enactments is a matter of state law. *See Ward v. Illinois*, 431 U.S. 767, 772 (1977) (construction of state statute by state's highest court binding on Supreme Court). Moreover, the constitutionality of the lot-size ordinance is not at issue in this case and the Petitioner's belated effort to raise the issue is inappropriate. *See Bragdon v. Abbott*, 524 U.S. 624, 638 (1998).

The Law Court's second challenged finding – the Petitioner's lack of compliance with the Town's lot-size ordinance – is closely related to the first. The relevant "non-compliance" is the date on which the subject parcel became a lot of record and the size of the parcel – facts which are not in dispute. The statutory exception upon which the Petitioner's argument is premised does not apply to lots created before 1970, which would include the subject parcel. However, the Town's ordinance does apply to such lots. Since the subject parcel was not large enough for a private sewer system under the Town's ordinance, it could not be used for the construction of a single-family house prior to the enactment of the 1990 wetland ordinance.

The Petitioner's third challenge is obviously an argument on the merits. Contrary to the Petitioner's suggestion, the Law Court correctly determined that the 1990 ordinance did not strip the subject parcel of all economically viable use. The Petitioner neglected to submit any evidence as to the value of the subject parcel before the 1990 ordinance was enacted. Moreover, the Petitioner

failed to generate a factual issue as to whether the lot retains substantial uses. In short, the only conclusion supported by the record is that the subject parcel has value notwithstanding the fact that it cannot be used for a single-family residence. The Law Court was compelled to conclude – consistent with its own precedent and the precedent of this Court – that a taking did not occur. *See Wyer v. Board of Envtl. Prot.*, 747 A.2d 192 (Me. 2000); *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n*, 450 A.2d 475 (Me. 1982); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

CONCLUSION

For the reasons discussed above, the Petition for Writ of Certiorari should be denied.

Dated: November 21, 2001

Respectfully submitted,

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STATE OF MAINE

CUMBERLAND, SS.

SUPERIOR COURT
CIVIL ACTION
Docket No. AP-97-059

MC ASSOCIATES,
Plaintiff

v.

INHABITANTS OF THE TOWN OF CAPE ELIZABETH, et al.,
Defendants

STIPULATION OF FACTS

The parties hereby submit the following stipulation of facts:

1. The Plaintiff acquired the Subject Parcel by a deed from Pine Tree Acres dated January 11, 1989. (Second Amended Complaint ¶ 7).

2. The Subject Parcel is located in Cape Elizabeth, west of Shore Road and north of Dyer Pond Road. *Id.*

3. The Plaintiff did not pay any money to acquire the property. (Cope Dep. at 15). In fact, the Plaintiff is unaware whether its predecessors-in-interest paid for the property and, if so, what amount was paid. *Id.* at 16-17.

4. As of January 11, 1989, the Town's Ordinance required at least 20,000 square feet of lot area for any proposed residential construction that

depended upon private sewerage.[1] (Smith Aff. ¶ 3 & Exh. 1).

5. It is undisputed that any home constructed on the Subject Property will require private sewerage. (Cope Dep. at 22).

6. At best, the Plaintiff's lot contains only 18,570 square feet. (Cope Dep. at 24-25 & Exh. 1).

7. On April 9, 1990, the Cape Elizabeth Town Council voted to enact amendments to the Ordinance establishing three wetlands zones: critical wetlands district, critical wetlands buffer, and wetlands protection district.[2] (Lane Aff. ¶ 11 & Exh. 4; Smith Aff. ¶ 4 & Exh. 2).

8. The Council's action followed two public hearings, during which the proposed amendments were open to public discussion. (Lane Aff. ¶¶ 3, 7 & 11 & Exhs. 2 & 4).

9. These public hearings were publicized in the *Portland Press Herald* in essentially the following form: "The Municipal Officers of the Town of Cape Elizabeth will hold a public hearing on Monday, April 9, 1990, 7:30 PM, Town Hall, on the proposed Wetlands Ordinance." *Id.* ¶¶ 3, 4, 8 & 9 & Exhs. 1 & 3.

10. The purpose of the Ordinance, with the proposed amendments, was to further the comprehensive plan by promoting "the health, safety and general welfare of its residents." (Smith Aff. ¶ 4 & Exh. 2 (Ch. 19, sec. 19-1-2)).

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[1] This provision also exists in the Town's present ordinance.

[2] The amendment became effective 30 days after enactment, on May 9, 1990.

11. In relevant part, the Town sought to: "encourage the most appropriate use of land throughout the Town[,] . . . to promote the coordinated development of unbuilt areas[,] . . . [and] to conserve natural resources." *Id.* (Ch. 19, sec. 19-1-2).

12. With respect to the wetlands protection provisions in particular, the Ordinance provides:

> The wetlands of the Town of Cape Elizabeth are fragile natural resources which provide for wildlife habitat, pollution control, storage and passage of flood waters, aquifer recharge, erosion control, education, scientific study, recreation and open space. Considerable wetland acreage nationally has been lost or impaired by drainage, dredging, filling, excavating, building, polluting, and other activities inconsistent with the natural uses of such areas. Therefore, it is the policy of the Town of Cape Elizabeth to ensure that wetlands are protected from detrimental impacts and that wetland alteration activities do not threaten public safety, welfare or cause nuisances, or negatively alter natural wetland ecology.

Id. (Ch. 19, sec. 19-3-9-01).

13. The amendments did not single out any particular properties in the Town for rezoning. (McGovern Aff. ¶ 5).

14. The general areas that were the subject of the proposed amendments were described in the proposed Ordinance. (Smith Aff. ¶ 4 & Exh. 2).

15. They were also reflected on a map that was publically available and posted at Town Hall

before the public hearings leading to the amendment's adoption. (McGovern Aff. ¶ 4 & Exh. 1).

16. The 1990 amendment provided a means for a landowner to verify the location of wetlands boundaries. (Smith Aff. ¶ 4 & Exh. 2 (Ch. 19, sec. 19-3-9-09)).

17. The 1990 amendment provides that no development of houses can occur in critical wetland districts. *Id.* (Ch. 19, sec. 19-2-8-02).

18. Moreover, in relevant part the amendment forbade development of houses within 250 feet of any critical wetland district that is not separated from adjacent areas by topography or other natural features. *Id.* (Ch. 19, sec. 19-3-9-06).[3]

19. In March of 1996, the Plaintiff submitted to the Town's Code Enforcement Officer a building permit application to construct a single-family residence on the Subject Property. The CEO denied the application on April 10, 1996. (Appellees' Rule 80B Brief Exh. 1).

20. The Plaintiff's submitted additional materials in support of its application by a letter dated May 10, 1996. *Id.* Exh. 2.

21. The CEO again denied the Plaintiff's application. *Id.* Exh. 3.

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[3] These provisions remained substantively unchanged when the Plaintiff requested a building permit in March of 1996. For ease of reference, it should be noted that the zones received new nomenclature in the interim period. Specifically, the critical wetland zones were renamed "Resource Protection 1 – Critical Wetland Zones" ("RP-1"), the buffer zones renamed "Resource Protection 1 – Critical Wetland Buffer" ("RP-1 Buffer"), and the wetland protection zones renamed "Resource Protection 2 – Wetland Protection Zones" ("RP-2").

22. The Plaintiff requested a verification of the wetland boundary. (Record at R-57).

23. The Town Planning Board received a substantial amount of information on the location of the boundary and held a public hearing. *Id.* at R-107.

24. The Planning Board concluded that the RP-1 zone included areas both south and north of Dyer Pond Road. *Id.* at R-107-08.

25. This decision has been affirmed by this Court. Decision and Order at 1-2 (July 16, 1998).

26. The effect of this decision was to confirm the application of the 250 foot buffer overlay on the Plaintiff's property. *Id.* at R-107-08.

27. On August 6, 1997, the Plaintiff "appealed" the Planning Board's decision to the Town Board of Zoning Appeals. *Id.* at R-110.

28. At the same time, the Plaintiff requested that the Zoning Appeals Board grant it a variance on the 250 buffer zone. *Id.* at R-125-27.

29. After a public hearing on August 26, 1997, the Zoning Appeals Board ruled that it had no authority to hear the appeal from the Planning Board and that it could not grant a variance that contradicted the uses permitted in the RP-1 Buffer Zone. *Id.* at R-139, 143.

30. The Court has also affirmed these findings by the Zoning Appeals Board. *Decision and Order* at 1-2 (July 16, 1998).

31. According to the Plaintiff, the Subject Property retains some value despite the effect of the Town's ordinance. (Cope Dep. at 49).

32. The Plaintiff testified that the Property is still worth at least $3,000. (Cope Dep. at 49).

33. In addition, the Plaintiff admits that the Town has never made any promises about the buildability of the Subject Property. (Cope Dep. at 38).

34. The Court has already determined that the Subject Property contains poorly drained soils. *Decision and Order* at 1-2 (July 16, 1998) (citing Record at 21, 73-75; Appendix at 11).

35. In addition, the Court has ruled that sufficient evidence exists to support the Town Planning Board's conclusion that a "Resource Protection 1 – Critical Wetland Zone" (as that term is defined by the Ordinance) extends from land south of Dyer Pond Road to land north of that Road. *Id.*

36. In 1996 and 1997, the Town had purchased various insurance policies, including general liability and public officials coverages. (McGovern Aff. ¶ 6).

37. However, all of these policies are amended by endorsements that restrict liability coverage to those instances where the Maine Tort Claims Act expressly waives the Town's immunity pursuant to 14 M.R.S.A. § 8104-A. (McGovern Aff. ¶ 7 & Exhs. 2 & 3).

38. The endorsements state that "[l]iability coverage shall not be deemed a waiver of any immunities or limitation of damages available under the Maine Tort Claims Act." *Id.*

39. Mitchell Cope, partner of the Plaintiff, was an officer, shareholder, or partner of all entities that owned the Subject Parcel from 1964.

40. The chain of title from 1964 to the present includes:

a. Linda Adams to The Minat Corporation by deed dated February 28, 1964 and recorded in the Cumberland County Registry of Deeds at Book 2806, Page 496.

b. The Minat Corporation to Arthar, Inc., by deed dated June 9, 1964 and recorded in the Cumberland County Registry of Deeds at Book 2836, Page 69.

c. Arthar Corp. to Pine Tree Acres by deed dated December 24, 1979 and recorded in the Cumberland County Registry of Deeds at Book 4548, Page 311.

d. Pine Tree Acres to M.C. Associates by deed dated January 11, 1989 and recorded in the Cumberland County Registry of Deeds at Book 8629, Page 137.

41. Mitchell Cope testified that each of these entities was separate and distinct.

42. Mitchell Cope testified that he considered the Subject Property "some retirement pay" and thought of it as part of his "estate planning."

43. The Official Zoning Map of the Town of Cape Elizabeth at the time the Plaintiff applied for its building permit shows the Subject Parcel being zoned Residential-A. A color copy of the Town's Official Zoning Map is attached to the Plaintiff's Opposition.

44. As the Court has already determined, at the time the Plaintiff applied for a building permit the Subject Parcel was also subject to a 250 foot buffer zone that was determined by field verification, as provided for in the Ordinance.

45. The Ordinance in effect as of January 11, 1989 also provides that if the lot area is less than

twenty thousand (20,000) square feet, the lot may be buildable if it meets the requirements of Section 19-3-3 and the State Minimum Lot Size statute.

46. Mitchell Cope testified that the Town assessed property taxes, and that the owner paid property taxes, in an amount that in his belief reflected that the lot was buildable.

47. The Town of Cape Elizabeth issued a street entrance permit for the Subject Parcel on June 23, 1989. The Permit is attached to Mr. Cope's Deposition as Exhibit 2.

48. The Town issues street entrance permits when it determines that the placement of a street entrance will not create a sight-line hazard to the lot owner or the public given the speed limit applicable to the relevant street.

49. Mitchell Cope testified that he relied on the Zoning Map of the Town to determine that the Subject Parcel was zoned to allow the construction of a single-family home.

50. At the request of the Plaintiff, Walter Stinson, a professional engineer, prepared a Subsurface Wastewater Disposal System Application dated December 16, 1988. The Application is attached to Mr. Cope's Deposition as Exhibit 1.

51. The Town never approved the Application dated December 16, 1988.

52. Also at the Plaintiff's request, an appraiser prepared two estimates as to the value of the Subject Property. The appraiser estimated the Subject Property's value as $88,000 as a "buildable" lot and $3,000 as a "non-buildable" lot.

The parties do not stipulate that these valuations are accurate or correct; the parties merely agree that the appraiser made these opinions.

Dated at Portland, Maine, this 22nd day of February, 2000.

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